DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 00-0134
STATE WITHHOLDING TAX
For Years 1990, 1991, 1992, 1993, and 1994

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ISSUES

I. Withholding Tax Levies Against Taxpayer as Responsible Officer:

Authority: IC 6-3-4-8(g); IC 6-8.1-5-1(b); Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

Taxpayer protests the levying against his personal bank accounts to recover unpaid trust taxes.

STATEMENT OF FACTS

Taxpayer was the chief executive officer and principal owner of two Indiana corporations engaged in the production of various metal products. During the 1980's taxpayer offered to lease space, within one of his two plants, to first owner of a small metal heat treating business. First owner accepted the offer, moved his business into one of taxpayer's two plants, and employed between two to three persons. After first owner died, taxpayer helped to arrange for the sale of the heat treating business. Taxpayer arranged with majority shareholder to form a corporation, "K", and for majority shareholder to purchase the assets of the heat treating business.

Taxpayer owned approximately 40% of the corporation's shares. Majority shareholder owned 50%, and minority shareholder owned 10%. Taxpayer, together with minority shareholder, contributed $5,000 in initial capitalization. Majority shareholder contributed $5,000. Majority shareholder arranged for a manager to oversee the day-to-day operation of the heat treating business but was himself present on site two to three days a week.

Taxpayer acknowledges that he was apparently named president of the corporation but believed that majority shareholder was actually operating as president. On the "Indiana Annual Report of Business Corporation" filed on February 23, 1996, taxpayer was named as "President" or "highest officer." On page two of the same document, taxpayer was named as "President and Treasurer." Minority shareholder was named as "Vice President and Secretary." The document is signed by Majority shareholder.

In 1990 taxpayer sold his two metal products' production facilities. The new owners eventually forced the heat treating business to leave the premises because it was in arrears in its rent and utility payments. Majority shareholder removed the business assets to Indianapolis from where the business continued to operate.

Taxpayer claims he first became aware of a tax deficiency when he received a "Final Notice of Warrant and Appearance Date." Taxpayer denied liability and provided the Sheriff the name of majority shareholder. Taxpayer claims he heard nothing else concerning these tax liabilities until he received the first of two levies against his personal bank accounts intended to satisfy the tax liabilities of the heat treating business.

I. **Withholding Tax Levies Against Taxpayer as Responsible Officer**:

Withholding taxes may be assessed against a responsible officer under the provisions of IC 6-3-4-8(g) which states that "[i]n the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Taxpayer raises the issue of whether, under IC 6-3-4-8(g), taxpayer was a corporate officer who had the authority to see that the withholding taxes were paid.

Pursuant to Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995), three factors are relevant in determining if taxpayer had that authority. The court looks to the person's position within the power structure of the corporation. Where that person is a high ranking corporate officer within the power structure, that officer is presumed to have had sufficient control over the company's finances to give rise to a duty to remit trust taxes. The presumption may be rebutted by a showing the officer did not in fact have that authority.

Second, the court will look to the authority of the officer as established by the articles of incorporation, bylaws, or employment contract.

Third, the court will consider whether the person actually exercised control over the finances of the business including whether the person controlled the corporate bank account, signed corporate check and tax returns, or determined when and in what order to pay creditors.

Under IC 6-8.1-5-1(b), the "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer maintains that though he was apparently named as president of the heat treating business, he never actually served as such. Instead, majority stockholder functioned as president. Taxpayer maintains that he never exercised any control over the corporation's tax obligations, never wrote a check on behalf of corporation, did not perform any managerial services on behalf of corporation, did not exercise any control over the corporation's obligations, and received no payment or wages from the corporation. ("R" Aff.)

In his affidavit, minority shareholder stated that he was unaware that he had been named as the corporation's vice-president and secretary in the "Indiana Annual Report of Business Corporation." Minority shareholder stated that neither he nor taxpayer ever functioned as corporate officers but that all corporate decisions were unilaterally made by majority shareholder. Concerning taxpayer's corporate involvement, minority shareholder stated that taxpayer did not handle any of the books or financial affairs of the corporation. Taxpayer was never responsible for paying corporate debts or for exercising corporate authority. ("B" Aff.)

The controller for the two corporations formerly owned by taxpayer provided information relevant to the control and operation of the heat treating business. Controller's duties included dealing with the heat treating business as both vendor and tenant. Virtually all controller's dealings were with majority shareholder who held himself out as president of the business. Though manager retained by majority shareholder exercised day-to-day operational control of the heat treating business, majority shareholder was "clearly the man in charge of the operation." Majority shareholder personally prepared the payroll and paid the bills of heat treating business. ("M" Aff.)

Under the guidelines established pursuant to Safayan, the presumption that taxpayer was a corporate officer presumed to have sufficient control over the corporation's finances giving rise to a duty to remit trust taxes is rebutted by the showing that taxpayer did not in fact have that authority. Taxpayer never actually exercised financial or managerial control over the heat treating business, did not sign corporate checks or tax returns, and did not determine when or in what order to pay creditors. Taxpayer has met his burden of establishing that the proposed assessment is invalid.

FINDING

Taxpayer's protest is sustained.